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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 893

BELL LINES, INC., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and TRANSAMERICAN FREIGHT LINES, INC., *Appellees*.

On Appeal from the United States District Court for the Southern District of West Virginia

MOTION TO AFFIRM

A. ALVIS LAYNE
EUGENE M. MALKIN
915 Pennsylvania Building
Washington, D. C. 20004
Attorneys for Appellee, Transamerican Freight Lines, Inc.

W. F. WUNSCHEL
Kanawha Valley Building
Charleston, West Virginia 25326
Of Counsel

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MOTION TO AFFIRM

Appellee, Transamerican Freight Lines, Inc. (Transamerican), pursuant to Rule 16 of the Rules of this Court, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge District Court dismissing appellants' complaints attacking orders of the Interstate Commerce Commission.

The Commission, by order dated December 5, 1967, found an urgent and immediate need for motor carrier transportation of general freight between points and areas in the Midwest and Southeast. Acting under section 210a(a) of the Interstate Commerce Act,* the Commission issued to Transamerican a temporary authority to provide the needed service. Appellants opposed the temporary authority application before the Commission claiming their services to be adequate for reasonable public needs and that the grant of temporary authority to Transamerican would divert a substantial part of their businesses. After the Commission had denied petitions seeking reconsideration of the action, appellants brought action in the court below to invalidate the temporary authority. Appellants requested and obtained from the District Court orders restraining operations under the temporary authority pending decision on appellants' complaints.

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* 49 U.S.C. § 310a(a). The section provides:

> To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

The District Court released its unanimous opinion sustaining the action of the Commission on September 19, 1969. Appellants thereupon requested the District Court to postpone entry of judgment vacating the order restraining operations so that appellants might again seek Commission reconsideration of the order granting temporary authority. Petitions requesting reconsideration were filed with the Commission by various of the appellants on September 24, October 1, and October 3, 1969. The petitions sought the Commission to revoke the temporary authority because a trial examiner had recommended denial of corresponding permanent authority for Transamerican and because of changes in carrier operations during the extended period of the District Court proceedings. Transamerican replied to these petitions. Attached to the reply were certified statements of shippers and receivers reiterating their need for service and the inadequacy of existing services. The Commission, by order dated October 17, 1969, found that "... no showing has been made which would warrant a conclusion different from that reflected by the said order of December 5, 1967" and denied the petitions for reconsideration. The District Court on October 22, 1969, after oral argument, denied a request that the Court compel the Commission to revoke the temporary authority for the reasons the Commission had rejected in the order of October 17, 1969. The District Court, also on October 22, 1969, directed entry of judgment in conformity with its opinion of September 19, 1969. After further oral argument, the District Court also denied appellants' request for a stay pending appeal, but stayed the order of the Commission until November 21, 1969 so that appellants might seek a further stay from a Justice of this Court.

Appellants filed notice of appeal October 30, 1969. Appellants' application for a further stay pending appeal was presented to the Chief Justice and was denied by him on November 21, 1969.

ARGUMENT

The decision of the District Court is plainly correct and should be affirmed without further argument.

1. Appellants argue that the shipper statements submitted to the Commission in support of the application for temporary authority did not furnish the detailed information specified in the Commission rules. On this basis appellants urge that the present case is like *Interstate Commerce Commission* v. *Black Ball Freight Service* (No. 382, October Term, 1969), *American Farm Lines* v. *Black Ball Freight Service* (No. 369, October Term, 1969). Appellants are wrong. The present case presents a substantially different factual situation than the *Black Ball* and *American Farm Lines* cases. The lower court in *Black Ball* noted that the statements before the Commission contained *no* evidence that the shippers supporting the application for temporary authority had attempted to use existing carriers. *Acme Cartage* v. *United States*, 290 F.Supp. 453 at 457; *Black Ball Freight Service* v. *United States*, 298 F. Supp. 1006 at 1011. In the present case, a great number of the statements complied with the most technical reading of the Commission rules as to information to be supplied. Others, while not furnishing every item specified in the rules, outlined transportation difficulties and problems with existing service sufficient to alert the Commission to shipper needs. The District Court specifically noted in its opinion that:

> While it is not the duty of this Court in these proceedings to read all of these letters, a sufficient

> number has been examined to verify the fact that some of them affirmatively deny the existence of available carrier services capable of meeting the needs in areas covered by the grant of authority while other letters affirm the fact that certain motor carriers have refused to render service desired by shippers and receivers. (Jurisdictional Statement, Appendix A, p. 31)

The lower court's decision sustaining the action of the Commission under the circumstances presented here accords with the interpretation and application of the Commission's temporary authority rules by other district courts. *Estes Express Lines* v. *United States*, 292 F.Supp. 842 (E.D. Va. 1969), *aff'd per curiam*, 394 U.S. 718 (1969); *Roadway Express, Inc.* v. *United States*, 263 F.Supp. 154 (N.D. Ohio 1966); *Superior Trucking Co.* v. *United States*, 302 F.Supp. 257 (N.D. Ga. 1969).

2. Appellants assert that the action of the Commission during the course of the administrative proceeding receiving and acting upon a petition by Transamerican requesting reconsideration in light of new and additional evidence violated the Commission's rules of practice. Appellants claim that *Upjohn Company* v. *Pennsylvania Railroad Company*, 381 F.2d 4 (6th Cir. 1967), prohibits such reconsideration. Appellants are wrong again. The Commission's rules of practice authorize a party to submit new and additional evidence as a basis for reconsideration of a prior ruling. 49 C.F.R. § 1100.101(b). Appellants, in fact, also filed successive petitions for reconsideration when, following the decision of the District Court, they requested the Commission to reconsider and revoke the temporary authority. *Upjohn* involved wholly different facts. In

Upjohn, the Court of Appeals refused to allow the Commission to reopen a reparation case after the lapse of three years and to reach a different result because of a change in Commission policy. The action of the Commission in reconsidering its order in this case is fully supported by *Resort Bus Lines, Inc. v. I.C.C.*, 251 F.Supp. 742 (S.D. N.Y. 1967). Rules of procedure should not be an obstacle to an informed decision. The Commission's rules of procedure should be interpreted and applied so as to permit a decision based on all available evidence.

2. Appellants argue that the grant of temporary authority must be revoked because during the delay of 10 months between argument and disposition of the case by the District Court (a) various carrier mergers and grants of operating authority occurred that allegedly improved service and (b) a Commission examiner recommended that a corresponding permanent application of Transamerican be denied. These arguments were presented to and rejected by the Commission and the District Court. Carrier changes always occur during the period necessary to complete the judicial review sought by the opponents to the grant of temporary authority. Such changes are not grounds for judicial reversal of the Commission's decision. *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503, 514-515 (1944). The examiner's report is but one step in the administrative process. The examiner's recommendation is subject to agency review and it may or may not be adopted by the Commission. In any event, the recommendation of the examiner is neither conclusive on the Commission nor dispositive of the issues in this proceeding.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted.

A. Alvis Layne
Eugene M. Malkin
915 Pennsylvania Building
Washington, D. C. 20004
Attorneys for Appellee,
Transamerican Freight
Lines, Inc.

W. P. Wunsch
Kanawha Valley Building
Charleston, West Virginia 25326
Of Counsel

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